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**Testimony of Alison Hirschel, Director,
Michigan Elder Justice Initiative
Regarding Senate Bill 64**

Good afternoon, Senator Emmons and Members of the Committee. My name is Alison Hirschel and I am the Director of the Michigan Elder Justice Initiative, a project of Michigan Poverty Law Program. We advocate for and represent low income older adults and people with disabilities and we have a particular focus on long term care consumers. For the past 30 years, I have provided free legal representation and assistance to individuals who reside in nursing homes and other long term care settings or receive home and community based services. I am also counsel to the State Long Term Care Ombudsman Program and the director of two local long term care ombudsman programs that cover 6 counties in the Lansing and Jackson areas of the state.

I want to offer special thanks to Senator Hansen for his continuing interest in nursing facilities and his willingness, going back several years, to work with a variety of stakeholders. I do have a concern about SB 64 and look forward to working with Senator Hansen and his staff to see if we can address it.

First, the bill refers repeatedly to "peer-reviewed, evidence-based, nationally recognized clinical process guidelines" and "peer-reviewed, evidence-based, best-practice resources." These guidelines and resources are to be used to reduce the likelihood of immediate jeopardy to residents (p. 12, Sec. 23(b), Draft 1, Substitute for SB64), determine whether a negative outcome can be considered more

limited or whether actual harm occurred (p. 14, Secs. 23(f) and (g), Draft 1, Substitute for SB 64), develop and implement resident care policies and compliance protocols (Sec. 25, Draft 1, Substitute for SB 64), and other purposes. In addition, on p. 19, the Substitute bill requires surveyors to consider these guidelines and resources used by facilities to “develop and implement resident care policies and compliance protocols” when determining whether or not to cite facilities.

I would be grateful if these guidelines and resources do indeed lead to better resident outcomes. However, I do not believe the legislature should require surveyors to consider a facility’s reliance on these unspecified guidelines and resources when determining if the facility should be cited. First, when my clients have a bad outcome in a facility—an injury that could have been prevented, a health consequence from a medication error, or skin breakdown (bedsores) because the facility had too few staff on the floor to turn an immobile resident—it is of little comfort to the resident or their anxious family that the facility had protocols gleaned from national standards. What matters to them is that something bad happened. And when something happens that is preventable and harmful or potentially harmful, facilities should be cited. That is the intent of the federal law, OBRA '87, which created a federal framework for nursing home survey and enforcement. In many aspects of life these days, we look at outcomes—not intent or process-- as the measure of success or failure. The same should be true in nursing facilities.

Second, surveyors already have detailed, voluminous, mandatory guidance from the federal government about how they should conduct surveys and take enforcement action. For example, surveyors are required to follow protocols in Appendix P and Appendix PP of the State Operations Manual. Appendix PP is 350 pages long, reviews every possible citation, and offers guidance on the intent of the provision, survey procedures that must be followed, probes for the surveyor to utilize,

and detailed interpretive guidelines to further explicate how to conduct the survey. According to CMS,

Survey protocols and Interpretive Guidelines are established to provide guidance to personnel conducting surveys. **They serve to clarify and/or explain the intent of the regulations and all surveyors are required to use them in assessing compliance with Federal requirements.** The purpose of the protocols and guidelines is to direct the surveyor's attention to certain avenues for investigation in preparation for the survey, in conducting the survey, and in evaluation of the survey findings.

The nursing home survey is conducted in accordance with the appropriate protocols (Appendix P) and substantive requirements in the statute and regulations to determine whether a citation of non-compliance is appropriate. Deficiencies are based on a violation of the statute or regulations, which, in turn, is to be based on observations of the nursing home's performance or practices.

<http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/GuidanceforLawsAndRegulations/Nursing-Homes.html> (emphasis added).

Adding another layer of guidance that surveyors should consider just makes their jobs more difficult and creates more confusion, not less, about what behavior or outcomes should be cited. However helpful and promising the peer-reviewed resources are, they are not the standard by which surveyors are directed by the federal government to do their jobs. Thus, while we are hopeful that the Department and the nursing home associations will be energetic in sharing information like these guidances that can promote better resident outcomes, facilities will be rewarded with fewer citations

because their outcomes are better, not because the surveyor knows they consulted national guidelines in establishing their protocols.

Thank you for your consideration of these comments.